

LEGAL SERVICES OF SOUTH CENTRAL MICHIGAN

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November 9, 2010

Corbin Davis
Clerk of the Court
Michigan Supreme Court
P.O. Box 30052
Lansing, MI 48909

Re: ADM File No. 2010-18
Proposed Amendment of Rule 6.1 of the Michigan Rules of Professional Conduct

Dear Mr. Davis,

I am writing to urge the Court to adopt Alternative B—the State Bar of Michigan Representative Assembly Proposal (hereafter referred to as the “State Bar Rule”).

I am the Co-Chair of the State Bar’s Pro Bono Initiative (PBI), the Bar body that developed the State Bar Rule. I have been a member of the PBI (or its predecessor Bar entity, the Pro Bono Involvement Committee) since 1992. I have been one of the chairs of the PBI since 2002. Although the comments in this letter reflect my experience as a Bar volunteer over the past 18 years, these are my personal comments, not the comments of the State Bar or of a Bar Committee.

I was puzzled to read the comments by Justice Markman that suggested that Alternative B narrowed and politicized the definition of pro bono. I appreciate this opportunity to explain why that is not the case. As someone deeply involved in the process that led to the Bar’s proposed rule, I want to describe the process, the PBI and the Bar’s intent, and the benefits I see in adopting Alternative B.

Background on the pro bono ethics rule. Michigan, along with almost every other state, has long considered the ABA model rules when developing its own rules of professional conduct. The ABA first proposed a pro bono rule for states to incorporate into their ethics codes in 1983. The ABA has updated model rule 6.1 twice since 1983. At this point in time, every state has a pro bono rule that is modeled after one of the ABA model rules.

After substantial discussion, the ABA revised model rule 6.1 in 1993—17 years ago. This rule was amended—but without significant changes in structure or content—in 2002. At present, over half the states have adopted rules based on the 1993 or 2002 ABA Model Rule 6.1.

Michigan first adopted its current MRPC 6.1 on October 1, 1988. This rule is based on the 1983 ABA model rule.

In response to the 1988 Rule 6.1, the Representative Assembly adopted the Voluntary Standard for Pro Bono Participation (hereafter referred to as the Voluntary Standard) on April 28, 1990. The Voluntary Standard is attached as A. The purpose of the Voluntary Standard has been to provide specific guidance to Michigan lawyers as to how they can fulfill the “responsibility” to provide pro bono publico service.

The main change from the ABA’s 1983 model rule to the current model rule has been to provide more specificity in informing lawyers how their pro bono responsibilities can be met. The evolution of the ABA rule is entirely consistent with what the State Bar of Michigan did in 1990 through the Voluntary Standard.

In drafting the State Bar Rule, the PBI combined the current ABA model rule 6.1 with the State Bar’s Voluntary Standard.¹ The PBI was not creating new standards—but rather putting these two longstanding and well-accepted sets of guidelines together in one place.

Justice Markman suggests that the State Bar Rule may “undermine the consensus that has always existed on the Court and within the legal profession in support of pro bono legal service”. There was certainly no intent to do that, nor do I believe that is the result of these revisions. In fact, the Voluntary Standard (adopted 20 years ago) and the ABA model rule (adopted 17 years ago) represent that very consensus in support of pro bono legal services by the bar.

Pro Bono has always prioritized service to the poor. Justice Markman also suggests Alternative B “narrow[s] the definition of pro bono” and makes pro bono “ideological and political” (p. 8) by, inter alia, “explicitly and repetitively focus[ing] upon lawyer efforts on behalf of persons of limited means...” (p.9). This suggestion is inconsistent with both the intent of the rule revisions and the role that pro bono has played in the profession.

First, pro bono has long been understood, primarily, to mean “services to the poor”. The first ABA statement of professional ethics—the ABA’s non-binding Canons of Professional Ethics published in 1908—states that a “client’s poverty” may justify the waiver of a lawyer’s fees and that “widows and orphans without ample means should receive special and kindly consideration”. This focus on the lawyer’s responsibility to provide access to the court system for the poor has been the foundation of every pro bono ethics rule since the 1908 rule.

The Michigan Voluntary Standard begins with a statement that “all active members of the State Bar of Michigan should participate in the direct delivery of **pro bono legal services to the poor...**” (emphasis added). The rule goes on to describe four specific types of services. In each of these four paragraphs, the client’s poverty is explicitly mentioned.²

The State Bar Rule’s “explicit and repetitive” focus on access to justice for the poor is not a new idea that the State Bar proposed this year. Rather this focus has been the foundation of every discussion of pro bono and is reflected in every document setting out pro bono standards or expectations from 1908 until today.

The PBI and its predecessor committees have been asked to interpret the Voluntary Standard on many occasions since 1990. On each occasion, the body has determined that the intent of the Voluntary Standard was to focus pro bono to services on the poor.

¹ For example, the ABA model rule sets out a guideline of 50 hours of pro bono service per attorney each year while the Voluntary Standard provides for 30 hours per attorney. The State Bar rule incorporates the number from the Voluntary Standard.

² Section (1) uses the words “low income individuals”; Sections (2) and (4) use the words “low income individuals or organizations”; Section 3 uses the words “persons of limited means”.

The State Bar Rule expands, not narrows, the definition of pro bono. In proposing Alternative B, it was the PBI's intent to expand the definition of pro bono by explicitly recognizing that, in addition to legal services to the poor, some other services may qualify as pro bono. See State Bar Rule at 6.1(b). Justice Markman questions the comment to the State Bar Rule that provides that in recognition of "the critical need for legal services that exists among persons of limited means" a "substantial majority" of services rendered each year should be provided to this group.

This language is taken verbatim from the ABA model rule. It reflects the longstanding national and state consensus that the focus of pro bono work should be on legal services to the poor. And it represents an expansion of the definition of pro bono—going from the current interpretation of the Voluntary Standard "all pro bono service should be service to the poor" to "a majority of pro bono service should be service to the poor".

Listing examples of pro bono work is not ideological. Some of Justice Markman's comments on Alternative B have to do with the examples listed in the comments to the rule—e.g. why mention the First Amendment and not the Second Amendment? (p. 9). I have three responses to these comments. First, the examples listed in the State Bar Rule are exactly that—examples. The whole idea of examples is that they form a non-exclusive list. So nothing in Alternative B precludes a lawyer from accepting as pro bono work most of the work suggested by Justice Markman, assuming such work meets the remaining guidelines in the rule.

Second, I want to emphasize that the language so troubling to Justice Markman comes directly from the ABA model rule—the PBI and the Bar believed that we were suggesting language that reflected a longstanding "consensus...in support of pro bono", not suggesting something ideological or divisive.

Third, the concerns raised by Justice Markman were not raised by the Representative Assembly (a large and diverse body) before the Assembly unanimously recommended the State Bar Rule. As chair of the PBI, I have followed the adoption of the ABA model rule in other states. That rule also went through an extensive vetting process before its adoption by the ABA Board of Governors in 1993. Justice Young and Markman's comments are the first I have seen from anyone ascribing an ideological motive to the ABA model rule.

Michigan lawyers need the guidance provided through the State Bar Rule. Justice Young's comments support a short general pro bono rule (page 7).

The reason that the ABA adopted a more detailed rule seventeen years ago is that lawyers and bar associations were asking for guidance and detail. After the adoption of the 1983 ABA model rule, many law firms and bar associations began to develop pro bono programs. There were many discussions regarding whether a given activity is or is not pro bono.³ The 1993 ABA model rule is a response to those requests for guidance and reflects a consensus that guidance regarding the ethics rule should be contained in the ethics rule and its comments.

In the 1990s, the situation in Michigan was a little different—since much of the guidance provided in the 1993 ABA model rule had already been provided by the State Bar through the Voluntary Standard. However, there are two problems with the Voluntary Standard approach. First, neither the Representative Assembly's actions nor the PBI's interpretations are truly authoritative readings of an ethics rule. Second, many lawyers are not aware of or acting in

³ As noted earlier, in Michigan, these questions were referred to the PBI for advisory answers.

compliance with the Voluntary Standard. Compiling the provisions where lawyers look for guidance – in the ethics rules – will help lawyers more easily locate this guidance.

This second point was dramatically brought home to the Bar through its recent study of pro bono. See *And Justice For All, A Report on Pro Bono in Michigan in 2007*, <http://www.michbar.org/programs/atj/pdfs/justiceforall.pdf>. The State Bar's 2007 study (hereafter referred to as *And Justice for All* or the 2007 Study) was conducted by the Institute for Social Research and Public Policy at Michigan State University. The Study included a survey of all members of the Bar; focus groups around the state; and in depth interviews with firm pro bono coordinators.

The 2007 Study indicated that 30% of the lawyers who responded to the survey were not aware of the Voluntary Standard before completing the survey. (2007 Study at p. 40.) The 2007 Study also documents that many lawyers misreported their pro bono work—e.g., counted activities as pro bono that did not comply with the Voluntary Standard. A shocking 42% of respondents counted paying clients who had failed to pay their fees as pro bono. (2007 Study at p. 42.)

The PBI's support of the more detailed rule was, in part, a response to the 2007 Study. The PBI believes that guidance to lawyers on these issues is critical and—for the reasons of consistency and authority and access—a revised MRPC 6.1 is the best vehicle to provide this guidance.

Conclusion. In writing, I wish to reassure the Court that there was no ideological intent in proposing the State Bar Rule. I also wish to emphasize that, by merging the 1990 State Bar Voluntary Standard and the 1993 ABA model ethics rule, the State Bar Rule did not “undermine the consensus ... in support of pro bono”—it simply restated that historical consensus in its current form. Finally, I wish to emphasize that including the substance of the Voluntary Standard in MRPC 6.1 will provide significant benefit to lawyers in the state—it will provide authoritative guidance to lawyers on how they can meet their pro bono responsibility through a vehicle that is familiar and immediately accessible to every lawyer in the state.

For the reasons set forth above, I respectfully request that the Court adopt Alternative B—the State Bar of Michigan Representative Assembly proposal as revised by the Supreme Court.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'RFG', with a stylized flourish at the end.

Robert F. Gillett (P29119)

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Voluntary Pro Bono Standards

As adopted by the Representative Assembly

All active members of the State Bar of Michigan should participate in the direct delivery of *Pro Bono* legal services to the poor by annually:

1. Providing representation without charge to a minimum of three low income individuals; or
2. Providing a minimum of thirty hours of representation or services, without charge, to low income individuals or organizations;¹ or
3. Providing a minimum of thirty hours of professional services at no fee or at a reduced fee to persons of limited means or to public service or charitable groups or organizations; or
4. Contributing a minimum of \$300 to not-for-profit programs² organized for the purpose of delivering civil legal services to low income individuals or organizations.³

¹ In recognition of the fact that some individuals may not be able to provide direct client representation, the time obligation may be fulfilled by active involvement in activities such as serving on a local *Pro Bono* committee or the board of directors of a legal aid or legal services program, training other lawyers through a structured program, engaging in community legal education programs or advising nonprofit, low income, or public interest organizations or groups.

² A list of eligible programs will be published by the Committee on *Pro Bono* Involvement and made available annually through the State Bar of Michigan.

³ An attorney's obligation may be fulfilled by a combination of activities such as direct representation of an individual in one case and a contribution of \$200.